**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| INTERNATIONAL UNION OF OPERATING ENGINEERS, CRAFT-MAINTENANCE DIVISION, UNITS 12 AND 13, | ) | |
| Charging Party, | ) | Case No. SF-CE-102-S |
| v. | ) | PERB Decision No. 1026-S |
| STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION), | ) | November 17, 1993 |
| Respondent. | ) | |

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Paul D. Supton, Attorney, for International Union of Operating Engineers, Craft-Maintenance Division, Units 12 and 13; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Parks and Recreation).

Before Blair, Chair; Carlyle and Garcia, Members.

## DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Parks and Recreation) (State) to a proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ found that the State violated the Ralph C. Dills Act (Dills Act) section 3519(a) and (b)[1] when it prohibited

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

maintenance services personnel in Units 12 and 13 from wearing union buttons on their uniforms and disciplined personnel for the wearing of buttons.

After review of the entire record, including the proposed decision, the State's exceptions, International Union of Operating Engineers, Craft-Maintenance Division, Units 12 and 13's (IUOE) cross-exceptions and responses thereto, the Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error. The Board, however, chooses to address the following exceptions raised on appeal.

## DISCUSSION

### Deferral to Arbitration

In the proposed decision, the ALJ determined that under Lake Elsinore School District (1987) PERB Decision No. 646, the Board was without jurisdiction to hear the alleged section 3519(a) violation concerning Unit 13 members, because the Memorandum of Understanding (MOU) contained an identical provision to section 3519(a) of the Dills Act and provided for binding arbitration of grievances.

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The State argues on appeal that the remaining allegations should also be deferred to binding arbitration. The State contends that in allowing IUOE to amend its complaint (over the State's objection) to include Unit 13, it also included the continued illegal conduct up to the present on the prohibition of wearing buttons. As a new MOU was in effect at the time of the amendment (which contained a binding arbitration clause), the State argues the matter should have been deferred to arbitration. The Board disagrees with the State's logic. As to Unit 12, the ALJ was correct in looking to the time the State took action against IUOE members complained of in the complaint. This occurred at a time when an MOU was not in place for Unit 12 members and as such, the Board has jurisdiction to hear and rule on the case. (State of California, Department of Youth Authority (1992) PERB Decision No. 962-S.)

As to the section 3519(b) violation concerning Unit 13, we affirm the ALJ's finding in refusing to defer this allegation to arbitration. As the ALJ properly found, a review of the parties' MOU finds no provision barring the State from denying employee organizations their rights under the Dills Act. As such, the ALJ correctly retained jurisdiction and ruled on the Unit 13 section 3519(b) claim.

Wearing of Buttons

In the past, the Board has had limited opportunities in ruling on "button" cases. In State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S, the Board

found that an employee had been wrongly discriminated against for wearing a union button and belt buckle. In its appeal, the State argues that the language of that case is dicta, and therefore the case before the Board is one of first impression.

Section 3515 provides that:

> . . . employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

In cases of alleged interference, a violation will be found when the employer's acts interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); Novato Unified School District (1982) PERB Decision No. 210.)

We concur with the ALJ that the wearing of union buttons is a protected right, absent special circumstances. However, in affirming the ALJ's proposed decision, we disagree with the State's contention that in finding a protected right, we have concluded that it is a per se violation for an employer to limit or prohibit the wearing of buttons. The right to wear buttons is not unlimited and is subject to reasonable regulation. If special circumstances exist, then the employer may well be within its rights to limit or prohibit the wearing of buttons by employees. In private sector cases, this view has been supported. (See Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793; Pay'N Save Corp. v. NLRB (9th Cir. 1981) 641 F.2d 697 [106

LRRM 3040]; NLRB v. Harrah's Club (9th Cir. 1964) 337 F.2d 177 [57 LRRM 2198] .)

Since the State banned the wearing of all union buttons, it is incumbent upon the State to demonstrate special circumstances for such a prohibition. The National Labor Relations Board (NLRB) has prohibited the wearing of union insignia when safety, discipline or effect on the employer has been shown (The Kendall Company (1983) 267 NLRB 963 [114 LRRM 1156]). Applying the same standard here, the State has failed to support its case. The record indicates that most members of Units 12 and 13 do not interact with the public nor does the pin by its design create a safety or health issue. Further, the State failed to demonstrate how the wearing of buttons had a disruptive effect on employees or the public. As no special circumstances have been demonstrated, we affirm the ALJ's finding that the State violated section 3519(a) of the Dills Act.

To establish a violation of section 3519(b), IUOE had the burden to establish a denial of its rights separate and apart from the rights of individual employees. (State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S.) IUOE has a protected right to communicate with its members at work sites. This right has been found by the Board to exist in its right of access. (See State of California. Department of Transportation, et al. (1981) PERB Decision No. 159b-S.) In a prior decision, the Board found that the wearing of a union button was not part of the organizational right to communicate because the union had

failed to produce independent evidence that the State had violated the union's rights under the Act. (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.)

Here, however, IUOE had just become the new exclusive representative for Unit 12. The purpose of the button was to identify the new representative, and to assist in identifying stewards on the job sites. Based upon the facts of this case, the ban of buttons by the State interfered with communication vital to IUOE's access and its right to represent its members.

Further, as the ALJ correctly pointed out, although alternative means of communications might be available, this does not make buttons any less legitimate. Whether or not other means of communication are available does not deny a particular form of access. Only when a particular type of communication is "disruptive" will the Board look to the existence of other means of communications. (University of California at Berkeley (1984) PERB Decision No. 420-H.) As stated earlier, the State was unable to demonstrate that the wearing of the buttons was disruptive. It was acknowledged by both parties that the majority of workers in both Units 12 and 13 have, little, if any contact with the public. This rebuts the State's argument that it needs to have its workers maintain politically, neutral uniforms. Further, the size of the button did not in any way significantly alter the uniform that could lead to safety or grooming problems. Therefore, the Board upholds the ALJ's

finding that the State interfered with the right of the exclusive representative to communicate with Units 12 and 13 members in violation of section 3519(b).

IUOE's Cross-Exceptions

In a cross-exception, IUOE argues that the ALJ erred in not finding that members have a First Amendment right to wear buttons as an exercise of their right of free speech. However, the Board supports the ALJ's finding that cases have ruled that the wearing of buttons is not protected by the First Amendment as the removal of the button is not to regulate off-duty speech but rather appearance, which has only incidental effects on speech. (INS v. FLRA (9th Cir. 1988) 885 F.2d 1449 [129 LRRM 2256].) Therefore, this cross-exception is rejected.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the State of California (Department of Parks and Recreation) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b).

Pursuant to Dills Act section 3514.5(c), it is hereby ordered that the State of California (Department of Parks and Recreation) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Prohibiting maintenance services personnel in Units 12 and 13 from wearing union buttons on their uniforms.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Remove any disciplinary action based upon the wearing of union buttons from the personnel files of Unit 12 and 13 personnel.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Chair Blair and Member Garcia joined in this Decision.

APPENDIX

**NOTICE TO EMPLOYEES**
**POSTED BY ORDER OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**
**An agency of the State of California**

After a hearing in Unfair Practice Case No. SF-CE-102-S, International Union of Operating Engineers, Craft-Maintenance Division, Units 12 and 13 v. State of California (Department of Parks and Recreation), in which all parties had the right to participate, it has been found that the State of California (Department of Parks and Recreation) violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Prohibiting maintenance services personnel in Units 12 and 13 from wearing union buttons on their uniforms.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Remove any disciplinary action based upon the wearing of union buttons from the personnel files of Unit 12 and 13 personnel.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF PARKS AND RECREATION)

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| INTERNATIONAL UNION OF OPERATING ENGINEERS, CRAFT-MAINTENANCE DIVISION, UNITS 12 AND 13,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION),<br><br>Respondent. | ) | Unfair Practice Case No. SF-CE-102-S<br><br>PROPOSED DECISION (2/24/93) |

Appearances; Van Bourg, Weinberg, Roger & Rosenfeld, by Paul D. Supton, Attorney, for International Union of Operating Engineers, Craft-Maintenance Division, Units 12 and 13; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Parks and Recreation).

Before JAMES W. TAMM, Administrative Law Judge.

## PROCEDURAL HISTORY

On November 15, 1991, the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE) filed a charge against the State of California (Department of Parks and Recreation) (State or Department). On February 18, 1992, the general counsel's office of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the State prohibited employees from wearing union buttons on their uniforms in violation of section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act or Act).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3519(a) and (b) provide that it shall be unlawful for the State to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

A settlement conference was held, however, the matter remained unresolved. After two party initiated continuances, a formal hearing was held on August 11 and 14, 1992. At the start of the hearing, the complaint was amended to include additional instances of the State prohibiting the wearing of union buttons in Unit 13, as well as Unit 12.[2] At the conclusion of the hearing, the parties waived transcripts and presented oral arguments. After supplemental arguments and additional case citations were filed, the case was submitted for decision.

## FINDINGS OF FACT

The material facts in this case are primarily undisputed. In May of 1991, IUOE prevailed in a decertification election and became the exclusive representative of Unit 12. IUOE was already the exclusive representative for Unit 13. Shortly thereafter, business representatives of the IUOE began traveling to various worksites to introduce themselves to the membership and familiarize the membership with their new exclusive representative. As part of their efforts to increase membership familiarization with the new union, the business representatives handed out union buttons.

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Unit 12 consists of craft and maintenance employees. Unit 13 consists of stationary engineers.

The buttons in question were one and one quarter inches in diameter with the words "STATIONARY ENGINEERS" written in letters approximately one-eighth inch high. The initials IUOE-AFL-CIO in letters one-sixteenth of an inch high are also on the face of the button. In the center of the button is a picture of a pressure gage with the name of the union circling it in letters so small they are barely visible.

According to the testimony of one IUOE Business Representative, Stephanie Allan (Allan), IUOE hoped that members wearing the buttons would help establish the fact that the employees were now represented by a new exclusive representative and would also increase awareness of upcoming negotiations.

At at least one location, Allan handed out a different button to the union steward. That button was slightly larger than the member's button (one and three-eighths inches in diameter) with the initials "IUOE" and the word "STEWARD" written across the face of the button in letters approximately one-quarter inch high. The steward button contained the same picture of a pressure gage as the member's button. The purpose of the steward button was to identify the union steward at that location in case unit members needed assistance at the worksite.

Shortly after members began wearing the buttons, employees in both Units 12 and 13 were told to remove the buttons because they did not conform with the department's grooming and uniform

guidelines.[3] At one worksite, a steward, Keith Kessler, was given a corrective interview follow-up letter which contained, among other items, a reference to his wearing the steward button.

The department's long standing policy regarding uniforms and grooming states:

> Unless otherwise covered by bargaining unit contract no jewelry may be worn other than watches, rings, the "Golden Bear" tie tack, special acts or service pins, or plain earrings.

The Memorandum of Understanding (MOU or contract) for both Units 12 and 13 contain no reference to jewelry or union buttons.

During June of 1991 at the negotiating table, the state's chief negotiator for Unit 12, Arnold Beck (Beck), made a proposal to the union that the grooming policy of the Department of Parks and Recreation operations manual be made part of the contract and that that section of the contract not be grievable or subject to arbitration. The negotiator for the union, Dennis Bonnifeld (Bonnifeld), rejected that proposal and argued that the grooming standards should not be part of the contract. Bonnifeld argued that if the state wanted to change the current grooming policy, it should be dealt with elsewhere.

The parties then agreed that Shelly Bahr-Sproger (Bahr-Sproger), the state's representative on the bargaining team from the Department of Parks and Recreation, and Joe Wexler

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[3]Allen also testified that she handed out identical buttons to members employed by the Department of Corrections, General Services and Caltrans. According to Allan's uncontested testimony, none of those departments prohibited members from wearing the buttons on their uniforms.

(Wexler), a union representative from the Department of Parks and Recreation, would meet in a different forum, away from the negotiating table, to discuss the grooming standards. At that meeting, Bahr-Sproger made a proposal to keep the current manual and current grooming standards the same. Wexler proposed instead that union pins and badges be allowed under the grooming policy. Bahr-Sproger rejected the union's proposal providing the right to wear union pins and buttons. Wexler then dropped his proposal and agreed to the state's proposal, which did not allow the wearing of union pins and buttons. Wexler and Bahr-Sproger then took this agreement to Bonnifeld to review. Bonnifeld asked whether this was what they had agreed upon and when they told him "yes," he signed at the bottom of the agreement. The state's negotiator, Beck, did not sign the agreement, however, Bahr-Sproger did.

Beck later withdrew the state's negotiating proposal to include grooming standards in the contract. Grooming standards were not negotiated at the bargaining table.

Although the state's copy of the grooming standards agreement has some language written in the upper right-hand corner indicating that the grooming standards would be implemented when the MOU was implemented, it is unclear whose handwriting it is. Bonnifeld testified that the handwriting was not on the document when he signed it. (See CP Exhibit #8.) Therefore, I cannot conclude that the handwritten portion of that agreement which indicates it will be implemented at the time of

the MOU implementation, is part of the agreement. Also, this agreement was not treated as a side agreement to the collective bargaining contract. Side agreements were kept through a different process and specifically noted as side agreements and addenda to the contract. The new grooming standard was clearly not a side agreement to the contract, nor was it a part of the contract itself.[4]

The Department categorizes its employees as either visitor services personnel or maintenance services personnel. If employees have, as part of their regular duties, contact with the public, they are considered visitor services personnel. Rangers, park aids, employees staffing kiosks at information centers, guides within museums, or others assigned to give direction or information to the public are examples of visitor services personnel. None of the employees represented by the IUOE in Units 12 or 13 are considered visitor services personnel. All are considered maintenance personnel.

Although maintenance personnel are not hired to deal with the public, they do have occasional incidental contact with the public. One maintenance employee from the Russian River area, testified that he spends about one percent of his time dealing with the public. He gave as an example, a single individual who asked for directions during the previous week. An auto mechanic

[4]Although Bahr-Sproger testified that she understood the grooming standard had been implemented, that evidence was hearsay and unsupported by other evidence. Pursuant to PERB Regulation 32176, such hearsay evidence is insufficient to support a finding. (Cal. Code of Regs., tit. 3, sec. 17.)

from the Hearst Castle Park, testified that he deals with the public once or twice a week when they wander into the maintenance area and ask for directions. A maintenance employee for a smaller park in the Clear Lake area, where only one maintenance employee and one visitor services employee are assigned, testified that he had daily contact with the public. Even so, he estimated that his public contact did not exceed two percent of his time.

Carl Chavez (Chavez), regional director for the Department's Northern District, testified that maintenance personnel will often have frequent contact with the public during some of their duties, such as cleaning restrooms.

The uniforms of the maintenance personnel are identical to those of the visitor services personnel with minor exceptions. For example, visitor services personnel such as rangers will often wear a badge or a shield on their uniform. Hats and name tags may also be different. Visitor services personnel wear metal name plates with a silver, satin, or dark green finish. In contrast, maintenance workers in Unit 12 wear a one-inch by four-inch dark green cloth name tag with the employee's name in white block lettering centered on the top of the tag and the words "TRADES & MAINTENANCE" centered at the bottom. Unit 13 employees wear similar cloth name tags, except the words "OPERATING ENGINEER" is centered below the name. All uniformed employees wear large bright gold shoulder patches identifying them as employees of the Department of Parks and Recreation.

Despite the name tags, which identify maintenance personnel as "TRADES & MAINTENANCE" or "OPERATING ENGINEER," the public often confuses maintenance personnel with rangers or other visitor services personnel.

Chavez testified that uniforms were required because of the need to identify personnel to the public. The policy forbidding union buttons is to create an identification to the public which is "essentially neutral." Chavez testified that all types of visitors come into the parks, and the Department wants its employees to be apolitical while they're working. According to Chavez, wearing a union button could presumably indicate the employees or the Department were not "politically neutral" and could offend some visitors.

Chavez first testified that, although he had never seen any, he thought religious medals could be worn on a chain around an employee's neck, if they were not a safety hazard. After reviewing the policy however, Chavez corrected his testimony indicating that the policy would not allow a religious medal to be worn. Chavez has, however, seen Department employees wear necklaces as well as United Way buttons. The United Way campaign is sponsored in part by the State of California. Seasonal employees also have worn Smokey-the-Bear buttons when they were conducting junior ranger programs and the buttons were given out as part of the program. There is no evidence of any other past or present deviation from the department's policy on uniforms and grooming.

IUOE witnesses testified that in addition to direct person-to-person communications with members, IUOE has bulletin boards at various worksites and a newsletter available to it.

## ISSUE

1. Should this complaint be deferred to arbitration?

2. Did the State violate section 3519(a) and (b) of the Dills Act by prohibiting employees from wearing union buttons on their uniforms during working hours?

3. Did IUOE waive its rights during negotiations?

## DISCUSSION

### Deferral Issue

Section 3514.5(a)(2) of the Dills Act states, in pertinent part, that PERB:

> [S]hall not . . . issue a complaint against conduct also prohibited by the provisions of the [MOU in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

According to the State, the MOUs in both Units 12 and 13, specifically prohibit reprisals for the exercise of Dills Act rights and require binding arbitration. The evidence at the hearing, however, was that no MOU between the exclusive representative and the State was in effect for Unit 12 at the time of the State's action. In State of California, Department of Youth Authority (1992) PERB Decision No. 962-S, the Board held that the State had no duty to arbitrate a retaliation claim when the adverse action occurred when there was no current agreement. The Board held:

> . . . although [the employee] retains a statutory right under the Dills Act to be free from employer retaliation, he obtains no vested right under the contract to be free of such retaliatory action. Furthermore, the expired agreement provides no independent authority which, under normal principles of contract interpretation, requires the arbitration provisions to continue. Because the State's duty to arbitrate this matter does not continue in effect after expiration of the agreement, the Board may not dismiss and defer this charge to arbitration. PERB remains the appropriate forum for resolving such disputes in the absence of contractual provisions for binding arbitration.

Therefore, deferral is not an appropriate defense to the Unit 12 allegations.

However, an MOU was in effect in Unit 13.[5] Article IV,

[5]The parties negotiated agreement was only partially admitted as evidence in the formal hearing. However, PERB may take official notice of its records. (John Swett Unified School District (1981) PERB Decision No. 188; Mendocino Community College District (1980) PERB Decision No. 144.) PERB Regulation 32120 requires, in pertinent part:

> Each employer entering into a written

Section 2 of that MOU states:

> No Reprisals
> The State employer and IUOE shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of the exercise of their rights guaranteed by the State Employer-Employee Relations Act.

The protection provided by the MOU is identical to the protection provided by section 3519(a) of the Dills Act. Article V of the MOU also provides for binding arbitration of grievances. Since the grievance machinery of the MOU covers the allegations raised by the unfair practice complaint and culminate in binding arbitration, the 3519(a) allegations pertaining to Unit 13 employees must be dismissed and deferred to arbitration.

In State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810-S, PERB held that where the contract prohibits retaliation and interference against employees, but does not also contain language barring the State from denying employee organizations their rights under the Dills Act, the section 3519(b) violation should not be deferred.

In this case, the State argues that Article II, section 3 entitled "Access" and Article II, section 7, entitled "Steward's Rights," cover the issues in the 3519(b) allegations and

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> agreement or memorandum of understanding with an exclusive representative pursuant to the . . . Ralph C. Dills Act . . . shall file two copies of the agreement and any amendments thereto with the regional office within 60 days after execution of the agreement, memorandum or amendment.

therefore, mandate deferral of those allegations. Those sections state:

> Access
>
> a. During the term of this agreement, paid staff representatives of IUOE may visit the work site for purposes related to the implementation and enforcement of this Agreement. Access shall be at the discretion of the department head or designee and cannot interfere with the work of the employees. The paid staff representatives must notify the department head or designee at least twenty-four (24) hours in advance of the visit. Access shall not be unreasonably withheld.
>
> b. The department head may restrict access to certain work sites or areas for reasons of safety, privacy, public order or other business-related reasons.
>
> Stewards' Rights
>
> a. The State recognizes and agrees to deal with designated stewards of IUOE on all matters relating to grievances.
>
> b. A written list of IUOE stewards serving each work location, listed by department, shall be furnished to the State immediately after their designation, and IUOE shall notify the State promptly of any changes of such officers or stewards. IUOE stewards shall not be recognized by the State until such lists or changes thereto are received. There shall be no more than one IUOE steward per work location.
>
> c. Upon request of an aggrieved employee, an IUOE steward may investigate the grievance, provided it is in his/her regular work location, and assist in its presentation. The steward shall be allowed reasonable time for the purpose of representing employees in Unit 13 during working hours without loss of compensation, subject to prior notification and approval by his/her immediate supervisor.

Neither of these sections even remotely cover the subject matter of the 3519(b) allegations in the complaint and therefore do not support deferral.

Allegations of violations of section 3519(a) and (b) in Unit 12 and 3519(b) in Unit 13 are not deferrable. Allegations of violations of section 3519(a) in Unit 13 are dismissed and deferred to arbitration.

Rights to Wear Union Buttons

Section 3515 provides, in pertinent part, that state employees:

> . . . shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

Section 3515.5 provides corresponding rights of unions to represent their members. Section 3519(a) and (b) makes it unlawful for the state employer to impose reprisals upon, interfere with or restrain employees because of the exercise of their rights or to deny employee organizations rights guaranteed by the Act. In a case such as this, involving allegations of interference, a violation will be found when the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad);[6] Novato Unified School

[6]The Carlsbad test for interference provides, in pertinent part:

District (1982) PERB Decision No. 210 rev. den. 1-10-83; Regents of the University of California (1983) PERB Decision No. 308-H; State of California (Department of Corrections) (1980) PERB Decision No. 127-S.)

Absent certain special circumstances which will be discussed later in this decision, the wearing of union buttons is a protected right. In the private sector the National Labor Relations Board (NLRB) has found that absent special circumstances, if evidence of a purpose protected by the Act is shown, the wearing of union buttons will be protected. (Pay'N Save Corp. v. NLRB (9th Cir. 1981) 641 F.2d 697 [106 LRRM 3040]; NLRB v. Harrah's Club (9th Cir. 1964) 337 F.2d 177 [57 LRRM 2198] (Harrah's Club). See also, Republic Aviation Corp. v. NLRB

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> (2) Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the [Act], a prima facie case shall be deemed to exist;
>
> (3) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> (4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> (5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

(1945) 324 U.S. 793 [16 LRRM 620], where the Court cited with approval the NLRB's finding that "[t]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act." (Id. at fn. 7.)

In the Federal sector, the Federal Labor Relations Authority (FLRA) has concluded that wearing a union button demonstrates employee support for the labor union, showing pride and affiliation and therefore, absent special circumstances, is protected. (U.S. Dept, of Justice v. FLRA (5th Cir. 1992) 955 F.2d 998 [139 LRRM 2820] (Justice v. FLRA).)

PERB has also recognized an employee's right to wear union buttons. In State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S, the Board found that a union steward within the Department of Parks and Recreation had been retaliated against when being evaluated for promotional opportunity. A few months prior to the evaluation, the employee, had worn a union button. The employee's supervisor asked him to remove the button. The employee obeyed the order, but later, on the advice of his union, put the button back on his uniform. The supervisor again ordered the employee to remove the button, but later reversed himself after consulting with the Department's labor relations officer.

In reviewing the employee's protected activity, the Board stated:

> Based upon [the employee's] job steward activities, including the union button incident . . . we conclude that [the employee] produced sufficient evidence to meet this aspect of the test. (supra, at p. 11.)

Furthermore, the Board also viewed the supervisor's conduct, in ordering the removal of the union button, as pretextual and evidence of anti-union animus, supra, pp. 12 & 17. Had wearing a union button not been a protected right, ordering its removal would not have evidenced anti-union animus, nor been found to be pretextual.

IUOE asserts two additional arguments for concluding that wearing union buttons is a protected right. The first is that the right to wear a union button is constitutionally protected by the first amendment. That argument has been rejected, however, on the grounds that such prohibitions do not attempt to regulate off-duty speech, but are addressed to appearance, and as such, have only incidental effects on speech. (INS v. FLRA (9th Cir. 1988) 885 F.2d 1449 [129 LRRM 2256] (INS v. FLRA); Justice v. FLRA.)

IUOE also argues that the Department's regulations are enforced inconsistently and in a manner discriminating against unions. IUOE cites the wearing of Smokey-the-Bear buttons, United Way buttons, necklaces, and religious emblems and medals as examples of inconsistent enforcement. The facts, however, do not support such an argument. Smokey-the-Bear buttons are worn and handed out to the public as part of the Department's educational programs. United Way pins are worn as part of a

State and Department sponsored charitable fund raising program. The evidence of religious medals was speculation by Chavez, who had never actually seen such medals or emblems worn, but thought that they would have been allowed. Later, after having reviewed the uniform policy, Chavez corrected his testimony and said that such medals would not be allowed. Chavez did testify that he had seen a necklace worn, which would be contrary to the policy. However, such an incidental departure from an otherwise consistently enforced rule is isolated and insufficient to invalidate the rule itself. Therefore, employee and union rights regarding the wearing of union buttons do not accrue due to inconsistent application of the policy within the unit.

Even though this policy is a longstanding uniform policy, implemented well before the IUOE sought to organize the unit, and enforced in a consistent manner without evidence of anti-union animus, it nevertheless interferes with the protected rights of the IUOE and of employees. The policy causes harm to IUOE and employee rights and pursuant to Carlsbad, the burden of showing operational necessity shifts to the State.

The State bases its operational necessity on its strong interest in having a uniformed workforce. According to the State, the purpose of the uniform is to identify the wearer as a member of the Department of Parks and Recreation, to improve the Department's public image by achieving high standards of uniform appearance, and, to promote pride in the organization. The State also expressed its desire to maintain politically neutral

uniforms, thereby avoiding controversy among park users who might be offended by union buttons.

The courts have considered a number of factors when presented with the issue of employers prohibiting the wearing of union buttons or insignia at work. Courts have reviewed the circumstances in which buttons are worn, the nature and physical appearance of pins or buttons, the nature of the employer's activities and the need for production, safety and discipline. (Justice v. FLRA.) In cases where special circumstances have created an operational necessity which justified a prohibition, there has been evidence that wearing union buttons or insignia has disrupted the employer's operations or maintenance of safety or discipline.

Special circumstances justifying a prohibition of union buttons or insignia existed where: (1) the buttons could jeopardize employee's safety (Andrews Wire Corporation (1971) 189 NLRB 108 [76 LRRM 1568].); (2) damaged machinery or products (Campbell Soup Company 159 NLRB 74 [62 LRRM 1352, enforced in part, enforcement denied in part on other grounds, (5th Cir. 1967) 380 F.2d 372 [65 LRRM 2608]); (3) exacerbate employee dissension (United Aircraft Corp. (1961) 134 NLRB 1632 [49 LRRM 1384]); (4) cause distraction from work demanding great concentration (Fabri-Tek. Inc. v. NLRB (8th Cir. 1965) 352 F.2d 577 [60 LRRM 2376]); (5) disrupt the uniformity, discipline, or appearance of neutrality among para-military law enforcement employees (Justice v. FLRA); or (5) damage the image to the

public by the employees coming into contact with the public in the absence of a protected purpose (Harrah's Club and Burger King Corp. v. NLRB (6th Cir. 1984) 725 F.2d 1053 [115 LRRM 2387] (Burger King).

Respondent bases its argument for operational necessity primarily upon three cases: Harrah's Club; Burger King; and INS v. FLRA. All three of these cases, however, can be distinguished from the case at hand. First, in all of these cases, the employees in question were considered public contact employees. In Burger King, the employee in question staffed a fast food restaurant's drive-thru window and thus had direct and continuous contact with customers as part of the employee's primary duties. In Harrah's Club, the employees in question were waiters whose job was to serve customers in the employer's theater showroom. In INS v. FLRA, the employees in question inspected members of the public and their vehicles for contraband. The court placed great emphasis upon the fact that the employees were law enforcement agents with frequent public contact.[7] The continuous public contact which was a regular part of the duties of the employees in these three cases makes them more similar to the Department's visitor services personnel than to the maintenance employees who have only incidental contact with the public.

[7]See also Justice v. FLRA, where the court specifically created a "special circumstance" because of the para-military law enforcement nature of the employees in question. In the case at hand, however, the employees are not a para-military police unit. They are plumbers, painters, mechanics, refuse collectors and other similar maintenance employees who would not be prohibited from wearing union buttons under Justice v. FLRA.

Additionally, Harrah's Club can be distinguished because the court found the record totally devoid of any evidence that wearing union buttons served any protected purpose. The court stated:

> The record shows that the wearing of union buttons was not part of any concerted campaign to organize the employees, or to promote collective bargaining, or to gain better hours, wages, or working conditions. There is no background of labor unrest in respondent's establishments, and respondent for many years has had a collective bargaining agreement with the union in question.

In the instant case there were clearly articulated purposes for wearing union buttons. In Unit 12, the IUOE had just won a decertification election and was trying to establish a presence among its new members. In both Units 12 and 13, the IUOE was seeking to build constituency support for upcoming bargaining and trying to identify job stewards to members who might not be familiar with them.

INS v. FLRA can also be distinguished because the court based its decision primarily upon an interpretation of a federal statutory management's rights clause which does not exist in the Dills Act.

The State also argues that an operational necessity is created by its desire to keep the uniforms politically neutral, thus avoiding antagonizing any members of the public who might be offended by the union button. This is not a persuasive argument. The legislature has, by statute, determined that employees have a right to be represented by employee organizations. This includes

the right of employees to show their allegiance to, and solidarity with, other members and the organization. Furthermore, the legislature has determined that collective bargaining is a reasonable method of resolving disputes and will promote the improvement of employer/employee relations within the State of California. The fact that some members of the public may find that offensive is not sufficient justification to deny employees their rights.

I conclude, therefore, that the Department has not met its burden of demonstrating an operational necessity which would justify the harm caused to employee and union rights by the prohibition of union buttons.

Assuming for the sake of argument, however, that the Department had shown some operational necessity for the ban on buttons, a balancing pursuant to Carlsbad, of the competing interests of the Department with the harm to employee and union rights, also results in finding a violation. The buttons were inconspicuous and unobtrusive. There was no possibility that they would confuse the public by creating the impression that the employees were not employed by the Department of Parks and Recreation. The employees all wore large and brightly colored departmental patches on each sleeve, clearly identifying them as Department employees. There was no evidence whatsoever that the buttons were a potential safety hazard, interfered with employer production or department operations, or exacerbated employee dissension in any way. Finally, these employees, unlike visitor

services personnel, have only incidental public contact.

These factors, combined with the legitimate purposes of promoting awareness of the new exclusive representative among a newly obtained unit, of clearly identifying job stewards to a membership unfamiliar with their identify, and of building support for upcoming bargaining, tip the scales in favor of IUOE and employee rights to wear the button, and supports a finding of a violation of section 3519(a) of the Dills Act.

In order to prevail on allegations of 3519(b) violations, IUOE must establish a denial of its rights separate and apart from the rights of individual employees. (State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S.) IUOE has met that burden. In distributing union buttons to employees, the IUOE had an organizational purpose of building visible support for its role in the upcoming negotiations as well as building an awareness of the identity of its stewards. In being denied these particular organization tools, the IUOE itself has been denied a valuable right separate and independent of the corresponding rights of employees and stewards to wear the buttons. Furthermore, denying stewards this method of identifying themselves to members who may be in need of representation also denies the IUOE a right essential to its role as representative of those employees.[8]

[8]The employer contends that this is not a legitimate organizational objective since the IUOE could have utilized other methods such as bulletin boards or the mail to identify stewards. However, the existence of possible alternative methods not utilized by the IUOE does not make this particular method any less legitimate.

Waiver Issue

The Department sets forth the additional defense of waiver. The employer argues that in the course of negotiations, the parties signed off on an agreement covering uniform guidelines for Unit 12 personnel. Since the precise issue of wearing union buttons was raised by the IUOE and rejected by the State, it was, according to the employer, a clear and unmistakable waiver of the right to wear union buttons.

This argument is rejected. The discussion and agreement referred to by the employer was outside the collective bargaining process. The parties specifically chose not to negotiate the issue of uniforms during the contract negotiations. Although at the hearing, the employer argued that the new grooming standards were to be implemented when the MOU was implemented, the only evidence of any such agreement was hearsay and thus, does not support such a conclusion.

The IUOE was seeking to include what it felt is a statutory right into the Department's grooming policy. When a union drops a proposal which seeks to codify statutory rights into the MOU, that conduct will not be seen as a clear and unmistakable waiver of its statutory rights. In the face of the Department's rejection of its proposal, dropping the proposal does not bar the union from seeking the statutory right through other vehicles, such as this unfair practice proceeding. If making such a proposal and then dropping it would forego any statutory rights on the issue, unions would be seriously discouraged from ever

making such proposals, thus impeding the collective bargaining process. (Los Angeles Community College District (1982) PERB Decision No. 252). Furthermore, a claim of waiver is an affirmative defense, therefore, the State has the burden of proof. Any doubts must be resolved against the State. (Morgan Hill Unified School District (1985) PERB Decision No. 554, California Evidence Code section 500.) The State has not met its burden of showing that the IUOE consciously yielded its interest in pursuing its statutory rights through other methods.

CONCLUSION

IUOE has established that both employee and IUOE rights were interfered with when the State prohibited maintenance services personnel within the Department of Parks and Recreation from wearing union buttons. There are no special circumstances in this case justifying the prohibition and the State has been unable to demonstrate an operational necessity for its prohibition. The IUOE did not, during the bargaining process, waive its right to seek enforcement of these rights through an unfair practice hearing.

In Unit 12, there was no MOU in effect between IUOE and the State at the time of the violations. Therefore, neither the section 3519(a) or (b) allegations are deferrable. In Unit 13, the MOU in effect provides individual employees with protection against retaliation and interference by the State and therefore the section 3519(a) allegations must be deferred to arbitration. In Unit 13, the IUOE has, however, established a violation of its

3519(b) rights separate and apart from the deferrable rights of individual employees.

REMEDY

Pursuant to the Ralph C. Dills Act section 3514.5(c), the Board is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In cases such as this, it is appropriate to direct the State to cease and desist from denying IUOE and employee rights by prohibiting maintenance services personnel in Units 12 and 13 from wearing union buttons on their uniforms. It is also appropriate to order the State to remove any disciplinary action on this issue from employees' personnel files. In particular, the State should remove from the personnel file of Keith Kessler that portion of the June 2, 1992 corrective interview letter which is based upon Kessler's wearing of a union steward button.

It is also appropriate that the State be required to post a notice incorporating the terms of the order. The Notice should be subscribed by an authorized agent of the Department, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the State has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the

purposes of the Ralph C. Dills Act that employees be informed of the resolution of the controversy and will announce the State's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; Placerville Union School District (1978) PERB Decision No. 69.)

## PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the State has been found to have violated the Ralph C. Dills Act (Act), Government Code section 3519(a) and (b). Pursuant to Government Code section 3514.5, it is hereby ordered that the State of California (Department of Parks and Recreation) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Prohibiting maintenance services personnel in Units 12 and 13 from wearing union buttons on their uniforms.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Remove any disciplinary action based upon the wearing of union buttons from the personnel files of Unit 12 and 13 personnel.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to State employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State of California (Department of Parks and Recreation) indicating that the State will comply with the

terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order with the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; (Cal. Code of Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy

served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, **32305 and 32140.)**

**James W. Tamm**
**Administrative** Law Judge